of America." The appraisers also reported that they recognized that at the time of the return of the property to the Company there would be damage for loss of patrons, but that a majority of the Board had found that the damage could not be appraised at the time their report was made. The Government and the Company both took appeals from the award of the appraisers.

The trial for the ascertainment of the "just compensation" due the Company began on March 4, 1946, before a jury, and ended March 19, 1946. The Company contended that the Government, while ostensibly taking only the right to use and occupy the laundry, had in legal effect taken all of the Company's physical assets and its business as well, including its trade routes and customers, and was obligated to pay the full market value of what was taken, estimated to be approximatey $1,000,000. The Company also contended that if the rental or use value of its laundry was to be used to measure compensation, evidence of the value of its trade routes and customers was admissible as an element of value.

The Government asserted that just compensation was to be measured by the market rental or use value of the laundry during the period in suit, plus the cost of restoring the plant and machinery to the condition in which they were on November 22, 1942.

The District Court was in accord with the Government's theory as to the proper basis for determining just compensation. The court's rulings and its instructions to the jury were in substantial conformity with that theory.

The jury by its verdict, filed March 20, 1946, determined that the compensation due the Company for the use and occupancy of its laundry for 3.6 years (November 22, 1942, to June 30, 1946) was $297,776.63, consisting of use or

rental value of $70,000 per annum, or $252,000 for the term, and $45,776.03 additional compensation for failure to return the property in the same condition as it was on November 22, 1942. Judgment was entered on the verdict. The court added interest at 6% (1) from November 22, 1942, until paid, on the amount adjudged due for the use of the laundry from November 22, 1942, to June 30, 1943, and (2) upon the amount due each year thereafter from the beginning of that year until paid, giving credit to the Government for the sums deposited as estimated compensation. Interest was also added from March 20, 1946, until paid, on the sum of $45,776.03 awarded for failure to return the property in the same condition as when taken.

On March 23, 1946, the Government returned the laundry to the Company, and on June 11, 1946, the Government paid into court $98,124.27, the amount required to satisfy the judgment. The Company was permitted by the court to withdraw $75,000 of this sum without prejudice to the Company's right of appeal.

For the purposes of this case, we shall assume, without deciding, that under § 258a of Title 40 U.S.C.A., the Company could accept $75,000 of the amount which the Government had deposited in court to satisfy the judgment, without waiving the right to challenge its validity.

In the Company's brief, "Points Relied upon for Reversal" are numbered from I to XXXII. They relate to the instructions of the court and to rulings with respect to pleadings and evidence. Most of them are not argued in the brief and virtually all of them reflect the divergence of views of counsel for the Company and those of the trial court relative to the proper standards for ascertaining just compensation. An unargued assertion of error is no more helpful to an appellate court than is an unsupported allegation of fact to a trial court. The burden of demonstrating

error is upon an appellant, and errors assigned, but not argued in his brief, are waived.[4]

In its brief, under the heading "Statement of the Case," the Company says:

"At the outset appellant believes this statement of the case would be lacking if counsel neglected to now state that errors are assigned principally for the failure of the court to permit the introduction of competent evidence as to the fair market value of the corporation assets as a going concern with its existing established trade routes at the time of taking on November 22, 1942, and to instruct the jury accordingly. Instead, the trial court took the position during the trial that just compensation should be measured only as interest at some per cent on the intrinsic value of the land, on the intrinsic value of the building, and on the intrinsic value of the machinery, and so instructed the jury, and excluded other evidence offered as to fair, reasonable market value. Evidence of estimated cost of repairing damaged property was permitted by government agents unfamiliar with the actual damages. The government did not repair or restore the damages to appellant's property. Its agents merely estimated what it would cost to place machinery, etc., again as it was on November 22, 1942."

It thus appears that the Company complains mainly of (1) the standards adopted for measuring just compensation, and (2) the evidence of the Government relating to the probable cost of repairing or restoring the damage to the plant and machinery attributable to the Government's use and occupancy.

The Company, in its brief, argues four "Propositions of Law." We shall discuss them in their order.

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[3] *Marin v. Ellis*, 8 Cir., 15 F.2d 321, 322; *In re Schulte-United, Inc.*, 8 Cir., 59 F.2d 553, 559; *Metropolitan Life Ins. Co. v. Armstrong*, 8 Cir., 85 F.2d 187, 195.

[4] *Denver Live Stock Commission Co. v. Lee*, 8 Cir., 18 F.2d 11, 13-14 and cases cited; *Shevenell v. Blackwood*, 8 Cir., 35 F.2d 421, 422; *American Ins. Co. v. Schauffler*, 8 Cir., 129 F.2d 143, 145.

The first proposition is stated as follows:

"When all the physical assets of a going business, such as a laundry and dry cleaning corporation, are condemned for the purpose of governmental operation of the same business for the exclusive use of the army, thus putting the condemnee corporation out of business entirely, the fair, reasonable market value to the corporation as a going concern on the date of the taking forms the proper legal basis upon which to measure such just compensation. The established laundry trade routes, when so proven to have a readily ascertainable value on the market, form a part of the composite fair market value on the date of taking. These routes are distinguished from the noncompensable items of good will, loss of profit, and loss of further business. If it is proven that these routes would be destroyed as a natural consequence, known to the condemnor as a direct and proximate result of the taking of the physical plant owned by the condemnee, their value forms a part of the total value of the compensable property taken. The refusal of the trial court to receive competent evidence offered to prove such value is reversible error."

We cannot accept this proposition as the law. The Government took exactly what it purported to take, namely, the temporary use and occupancy of the Company's laundry. The Government did not take or intend to take, and obviously could not use, the Company's business, trade routes or customers. No doubt the Government's occupation of the plant disrupted and damaged the Company's business, although it could hardly have destroyed the demand for laundry service in the city of Omaha or disabled the Company from ever re-establishing its business. If the taking of the temporary occupancy of the Company's laundry were to be given the effect of the taking of fee title to the laundry, it is certain that the damage done to the Company's business would not be compensable under the Fifth Amendment.[5]

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[5] *United States* v. *Petty Motor Co.*, 327 U.S. 372, 377-378; *United States* v. *General Motors Corp.*, 323 U.S. 373, 379-380, 383; *United States ex rel. Tennessee Valley Authority* v. *Powelson*, 319 U.S. 266, 281-282; *Mitchell* v. *United States*, 267 U.S. 341, 345; *Joslin Manufacturing Co.* v. *City of Providence*, 262 U.S. 668, 675; *Bothwell* v. *United States*, 254 U.S. 231.

It cannot successfully be argued that the opinion of the Supreme Court in *United States* v. *General Motors Corp.*, 323 U.S. 373, contains implications that all consequential damages proximately caused by the taking of temporary occupancy of a building may be proved "not as independent items of damage but to aid in the determination of what would be the usual—the market—price which would be asked and paid for such temporary occupancy of the building then in use * * *" (page 383). This, because the Court also said in that opinion (page 383):

"* * * Proof of such costs [necessary costs to condemnee for removal of personal property, its storage and its return] as affecting market value is to be distinguished from proof of value peculiar to the respondent [condemnee], or the value of good-will or of injury to the business of the respondent which, in this case as in the case of the condemnation of a fee, must be excluded from the reckoning."

In the case of *United States* v. *Petty Motor Co.*, 327 U.S. 372, which involved the taking of the leaseholds of tenants in addition to taking the temporary use of a fee, the Court, in distinguishing that case from the General Motors case, said (p. 379-380):

"* * * There is a fundamental difference between the taking of a part of a lease and the taking of the whole lease. That difference is that the lessee must return to the leasehold at the end of the Government's use or at least the responsibility for the period of the lease which is not taken rests upon the lessee. * * * Because of that continuing obligation in all takings of temporary occupancy of leaseholds, the value of the rights of the lessees which are taken may be affected by *evidence of the cost of temporary removal.* [Italics supplied.]"

In the instant case, had the Government taken the temporary use of the building alone, and had the Company been required to remove its machinery and equipment, and to store them and then return them to the building at the end of the Government's term, the necessary cost of so do-

ing, as bearing on the question of the market value of the use and occupancy taken, could, no doubt, have been proved and considered.

Where the right to temporarily use and occupy property is the interest taken, just compensation is the value on the market of the use and occupancy (*United States* v. *Petty Motor Co., supra*, page 377), but evidence of loss of profits, damage to good will, and other such consequential losses must be excluded in determining market value. Id., pages 377-378.

The compensation contemplated by the Fifth Amendment is the market rental value of the temporary use and occupancy taken. *United States* v. *General Motors Corp., supra*, pages 382-383 of 323 U.S. In effect, the Government takes a lease and is obligated to pay as rent the full market rental value of the property occupied. In addition, the owner, as the constructive lessor, is entitled to additional compensation for any destruction, damage and depreciation in value of the property occasioned by its temporary use. Id., pages 383-384. The Government, as the constructive lessee, obligates itself to return the property in as good condition as when received, "ordinary wear and tear and damage by the elements alone excepted."

The District Court did not err in excluding evidence as to the value of the Company's trade routes and customers or going business.

The Company's second "Proposition of Law" is as follows:

"Where the trial court rejects or receives evidence which adversely affects a substantial and material right of a party litigant, the cause should be reversed and remanded."

Under this proposition, the Company states that witnesses were permitted to testify who did not see or know

the property as it was in 1942, and knew nothing of its value at any time; that the formula used by the Government's witness Weber formed no adequate basis for determining just compensation; that there was competent evidence of fair rental value, but that it was nullified by the court's instructions.

The District Court's charge is not a model of conciseness or accuracy. It contains statements which standing alone are subject to criticism, such as: "With these considerations in mind, how are we going to find the fair rental value for the use of this property? There does not seem to be anyone qualified to help us reach that figure. We must approach it, however, from such evidence as we can obtain." Taking the charge as a whole, however, we think it adequately apprised the jury of the applicable law and the considerations upon which a verdict could lawfully be based, and did not nullify the pertinent evidence admitted. Moreover, after listening for two weeks to conflicting estimates and opinions as to fair rental value and as to damages to and deterioration of the plant and machinery attributable to the Government's use, the jury could hardly have had any illusions as to the issues of fact which were presented by the evidence. So far as the record shows, no attempt was made by the Government, during the trial, to minimize the usefulness or capacity of the laundry or to show that it was not completely equipped and in profitable operation when taken over by the Government. It insisted, however, that the Company was not entitled to have loss of trade routes and customers, expenses of litigation, and other consequential damages, considered in determining just compensation for the use and occupancy of the laundry.

The market rental value of the laundry and the damage and deterioration resulting from its use by the Government

had to be estimated. There was no actual market for the temporary use and occupancy of laundries. The men employed by the Government to estimate rental value and damage to machinery and equipment were competent and qualified to do that work. Their testimony was admissible. Their credibility, the weight of their testimony, and the soundness of their opinions were for the jury to evaluate. *Svenson v. Mutual Life Ins. Co. of New York*, 8 Cir., 87 F.2d 441, 445, and cases cited. "After a witness has testified that he knows the property and its value, he may be called upon to state such value. The means and extent of his information, and therefore the worth of his opinion, may be developed at length on cross-examination." *Montana Railway Co. v. Warren*, 137 U.S. 348, 354. Whether an expert witness is qualified to testify is primarily a question for the trial judge, whose determination can be upset only for an abuse of discretion. *Love v. United States*, 8 Cir., 141 F.2d 981, 983, and cases cited. The fact that many of the Government's experts on value or on damage to equipment and machinery had not seen the laundry in 1942 did not disqualify them to testify to their estimates of its value at that time. They had heard the condition of the plant and machinery fully described, and assumed that it was in either good or first-class condition at the time the Government took over.

The Company's "Proposition of Law No. III" is:

"The conduct of a case in condemnation under the federal statute shall be governed by the laws of the state in which the condemned property is located."

The contention made is that loss to a business occasioned by a taking of property under the power of eminent domain is compensable in Nebraska. What constitutes property and what is just compensation under the Fifth Amendment is not a question of Nebraska law, but of federal law. *State of Nebraska v. United States*, 8 Cir., 164 F.2d 866, 867, 868.

The Company refers also to the refusal of the court to permit the introduction, in rebuttal, of evidence proffered to show that the estimates of Government witnesses as to the amounts required to restore the laundry to its former condition were too low. The testimony rejected was a part of the Company's main case. The order of proof on a trial is largely within the discretion of the trial court. *Philadelphia & Trenton Railroad Co. v. Stimpson*, 14 Peters (39 U.S.) 448, 462-463; *Wills v. Russell*, 100 U.S. 621, 626; 53 Am. Jur., Trial, §§ 115, 116, pages 101-104. There was no such abuse of discretion in rejecting the Company's proffered evidence as would warrant a reversal.

The Company's "Proposition of Law No. IV" is as follows:

"When payments for just compensation are delayed, 'additional' compensation measured by 6% of the total amount ultimately found due from the date of the taking must be as a matter of law added to the judgment, with credit for the amounts paid with 6% added to date of ultimate judgment."

Section 258a of Title 40 U.S.C.A. provides: "* * * and the said judgment shall include, as part of the just compensation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the court." The Company contends that, since the ultimate award was $297,776.03, interest should run at 6% on the entire amount from November 22, 1942, until the date of payment of the judgment, without including, however, interest on sums deposited as estimated compensation.

The question presented is not free from doubt. From a realistic viewpoint, what the Government took on Novem-

pellant, Kimball Laundry Company, will be submitted for review by the Supreme Court of the United States. Appellant will petition the Supreme Court of the United States to grant a writ of certiorari, as the appellant in good faith believes that its property has been taken by the condemnor without just compensation as provided in the Fifth Amendment to the Constitution of the United States and the federal statutes enacted in pursuance of the said constitutional provision.

2. This application for stay is based upon Section 8 (a) (b) (d), 43 Stat. 940, being Section 350 of the Judicial Code found in 28 U. S. C. A. 1947 Cumulative Pocket Part, page 138.

3. Surety company bond is on file to guarantee all costs on appeal, and in addition thereto there is on deposit with the Registry of Court in the office of the Clerk of the United States District Court at Omaha, Nebraska, in this cause [fol. 19] ample cash as the property of the appellant, Kimball Laundry Company, to protect against all costs and expenses that might ultimately be taxed to the said appellant, Kimball Laundry Company, in this cause.

4. Said Kimball Laundry Company, a corporation, the appellant, will be the petitioner for said writ of certiorari, and this stay is requested in accordance with Rule 16(c) of the United States Circuit Court of Appeals for the Eighth Circuit and is requested for a period of thirty days. During said period of time there will be filed with the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit a certificate from the Clerk of the Supreme Court of the United States that the petition for writ of certiorari, record, and brief have been filed. The petitioner herein will correspond with the Clerk of the United States Circuit Court and place with him such deposit as may be required in pursuance of Rule 17(c) and (e) in due time and within said thirty day period, in order that the Clerk may be fully compensated for costs as in such cases made and provided.

5. This application is made in good faith and not for the purpose of delay, and is for the purpose of obtaining a reversal of the opinion and judgment of the United States

Circuit Court of Appeals for the Eighth Circuit above referred to.

Dated at Omaha, Nebraska, this 24th day of March, 1948.

KIMBALL LAUNDRY COMPANY,
Appellant,
By William J. Hotz, Its Attorneys.

Hotz & Hotz,
William J. Hotz, Jr.,
William F. Dalton.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Mar. 25, 1948.

[fol. 26] (Order Staying Issuance of Mandate.)

March Term, 1948.

Thursday, March 25, 1948.

On Consideration of the motion of Appellant for a stay of the mandate in this cause pending a petition to the Supreme Court of the United States for a writ of certiorari, It is now here ordered by this Court, that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days, there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

March 25, 1948.

(Application for Additional Stay of Issuance of Mandate.)

Western Union.

April 16, 1948.

E. E. Koch,
Clerk, U. S. Circuit Court of Appeals,
St. Louis, Mo.

Please consider this wire application for an additional fifteen days from April Twenty Fourth for staying of

Mandate in Number Thirteen Four Ninety Four, Kimball [fol. 21] vs. United States. We have excellent cause for request if such showing necessary. Federal Statute grants us Three Months from March Eleventh to file Petition for Writ. Therefore we assume your Rule Sixteen C does not preclude Circuit Court from granting the additional fifteen days herein applied for. Please advise by Wire.

WILLIAM J. HOTZ.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Apr. 17, 1948.

(Order Further Staying Issuance of Mandate)

March Term, 1948.

Saturday, April 17, 1948.

On Consideration of the application of appellant for a further stay of issuance of the mandate in this cause pending a petition to the Supreme Court of the United States for a writ of certiorari, It is now here ordered by this Court that the issuance of the mandate herein be, and the same is hereby, further stayed for a period of fifteen days from and after April 24, 1948, and if within said period there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, the further stay hereby granted shall continue until the final disposition of the case by the Supeme Court.

April 17, 1948.

[fol. 22] (Clerk's Certificate)

United States Circuit Court of Appeals

Eighth Circuit

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing transcript consisting of four volumes contains printed record filed on July 2, 1947, composed of three volumes, Volume I consisting of pages a to 180, in

clusive, Volume II consisting of pages 181 to 460, inclusive, and Volume III consisting of pages 461 to 868, inclusive, on which the appeal from the District Court of the United States for the District of Nebraska was heard in said Circuit Court of Appeals, and full, true and complete copies of the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, composed of one volume, Volume IV, consisting of pages 1 to 22, in a certain cause in said Circuit Court of Appeals wherein Kimball Laundry Company, a Corporation, was Appellant, and the United States of America was Appellee; No. 13,494.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this 26th day of April, A. D. 1948.

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

(Seal)

[fol. 23] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 11, 1948

The petition herein for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit is granted.

And it is further ordered that the duty certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

In the
Supreme Court of the United States

OCTOBER TERM, 1947

NO. 830

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In the
Supreme Court of the United States

OCTOBER TERM, 1947

NO. 830

KIMBALL LAUNDRY COMPANY, A Corporation,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

TO: THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

The petition of Kimball Laundry Company, a corporation of Omaha, Nebraska, respectfully prays for a writ of certiorari to the United States Circuit Court of Appeals, Eighth Circuit, to review the decision of said court

rendered March 11, 1948, affirming a judgment of the United States District Court for the District of Nebraska given in a condemnation proceedings wherein the petitioner's laundry and dry cleaning plant was totally taken for Army military purposes on November 21, 1942. The case was tried to a jury on March 4-20, 1946. On March 22, 1946, the Army declared the property surplus and abandoned it to the petitioner. The government prevailed in limiting its liability for 3.6 years, measured by interest on its appraised value of land, building, and machinery, plus its estimate of the costs to replace certain broken parts of the building and machinery. The petitioner as owner and operator was denied all of the measures for compensable damage which it offered to prove, as hereinafter set forth.

THE OPINION

The opinion dated March 11, 1948, sought to be reversed is Kimball Laundry Company, a Corporation, appellant, versus United States of America, appellee, Civil No. 13494, found in Vol. IV of the certified record (166 F. 2d 856, May 10, 1948).

JURISDICTION

The Court has jurisdiction to review said decision under Section 240, Judicial Code (28 U. S. C. 347a).

THE STATUTES INVOLVED

The statutes involved are copied in the appendix (App.) to the appellant's brief (Aplt's. br.) filed in the Circuit Court and certified with the record (Vols. I, II, III, IV) now before this Court (Aplt's. br., pp. 1-15). They are:

28 U. S. C. § 391 (Judicial Code, § 269).

40 U. S. C. § 257, 258, 258a. Fed. Rules 81a (7).

50 U. S. C. § 171; 171a; 621; 632; 636, amending 721; 636a, further amendments; 721; 722 (providing methods to pay government upon return of property to owner; 775; 776.

Fifth Amendment to Federal Constitution on "just compensation."

Constitution of Nebraska, Art. I, § 21 (Vol. II, Rev. Stat. Neb. 1943, on "just compensation." (Aplt's. br., App. 13).

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED

EXPLANATION: The footnotes where indicated direct attention to the points relied upon for reversal, and where the point is discussed and argued as error in appellant's brief in the circuit court. By stipulation of counsel when the record on appeal was prepared, the points relied upon for reversal were placed in the appellant's brief rather than in the record (Vol. I, 142). Thus the brief becomes a part of the record for review to that extent and the limited pages for brief and argument were thus curtailed.

However, contrary to the statement in the opinion of the circuit court (Vol. IV, 61), each point relied upon for reversal was discussed and argued in appellant's brief (Aplt's. br., pp. 14-88), followed by the supporting propositions of law (Aplt's. br., pp. 89-126). Thus the necessity of reference to appellant's brief.

1. The petitioner, Kimball Laundry Company, is a Nebraska corporation. It owned the fee title, free from liens, to all the real estate. Its personal property was free from liens or claims. It was using all its facilities,

as a going concern, to operate an exceptionally large laundry and dry cleaning establishment in Omaha, Nebraska. It was neither the lessee nor lessor of any of the property involved. It had the "temporary use" of none of its real or personal property for any purpose.[1] This was the condition on Saturday, November 21, 1942, the day on which the petition in condemnation was filed in the United States Court.[2] The Army Quartermaster Corps took complete possession the following day of all petitioner's plant with all its facilities, machinery, and equipment. The petitioner was, by force of the taking, put out of business.[3] The Army continued without interruption the operation of the plant with petitioner's 180 employees and managerial staff. Soon prisoners of war (100) replaced the skilled employees.[4] The Army serviced for pay the laundry and dry cleaning requirements of the soldiers, officers, and all the Army hospitals, training centers, and forts in the Seventh Service Command from this property (Vol. II, pp. 447-8).

2. The Army was admittedly in the continuous, uninterrupted possession and operation of the property to the exclusion of the petitioner herein from the time of the taking up to the day that it was declared surplus and abandoned to the petitioner two days after the jury's

1. Complete word picture of plant, Vol. I, 273-285. Previous 5 year audit to show value, Vol. I, 282. Rejected by the Court.

2. Pet., Vol. II, pp. 273-285. Condemns "right to use and occupy" p. 2. Also right to use and occupy—"all personal property—used in connection with said laundry." Order of taking recited—"prior to taking over business of said property." Vol. I, 11; and taken for—"the establishment of a military laundry located in the city of Omaha—." Vol. I, 17.

3. The Court rejected the Evidence of the President of the Company that it was completely driven out of business as immaterial. Vol. II, 437-9. Error discussed Aplt's. Br. XIX, p. 61.

4. Vol. II, 266-270. Prisoners of war (100) by replacing skilled employees added to the destruction of the machinery and equipment.

verdict on March 29, 1946 (Vol. I, 97), when said property was "found and declared to be surplus as of March 23, 1946."

3. When taken, the company was doing an annual gross business of approximately $400,000.00. Financial statements showed a continual growth in volume and income since 1933.[5] It was one of the most efficient and expensively equipped laundries west of Chicago.[6] Its building taken was built of steel and concrete, five stories, 132 feet square. Its business was obviously that of a servicing corporation for those who required such services. It sold no merchandise; it manufactured none. Its value depended upon the services performed. Its gross income since 1924 was $6,728,454.64.[7] The audits showed what part of this went into the plant, to build and develop the assets and trade routes.[7] The cost of the machinery and equipment at the time of the taking in 1942 was $405,294.84.[8] Its appraised value at that time was $273,831.39, and the same men in 1945 appraised it at $120,699.75.

5. All these Certified Public Accountants' evidence and exhibits were rejected save one column showing volume that was of no value without the complete audit. In a Servicing Company the business results are necessary to arrive at value besides the "brick and mortar." Vol. II, Ex. 1, p. 190; Ex. 2, p. 193; Ex. 3, p. 200; Ex. 4, p. 204; Ex. 5, p. 206; Ex. 6, pp. 214-18; Ex. 7, p. 221.

Error in rejections, Aplt's. br. VII, pp. 28-33, where each exhibit is discussed fully, with Court's ruling by page reference to record, if not recopied. In the Propositions of Law these exhibits and testimony are argued and further discussed, Aplt's. br., p. 95, 119, as to $400,000 business Vol. II, pp. 199-200.

6. Vol. II, p. 401; 396-401.

7. C. P. A.—Hilmer's testimony of Exhibits, Vol. II, pp. 199-221 (rejected; cf. footnote 5 above.)

8. Vol. II, pp. 245-262, Ex. 21-3, p. 266. Shows value of machinery and equipment in 1942, and by same witnesses in 1945 before the trial. Difference in value—$153,131.54. This evidence was taken from jury by Court's instructions. Error discussed Aplt's. br., p. 39, IX, argued under Propositions of Law, p. 143. It will be seen by the references that such measure of damages was denied consideration by the jury. Vol. I, pp. 152-165.

The cost of the building at the time of the taking was $205,035.12. The reproduction value of the building with an additional story was, on November 21, 1942, $280,348.00.[9] The power equipment was valued when taken at $62,928.08.[10] The land upon which the building and equipment stood was valued at $30,000.00. Its location was in downtown Omaha.

Building	$280,348.00
Machinery and equipment	273,831.39
Power equipment and incidental installations	62,928.08
Land	30,000.00
Customers routes	340,516.85
Total	$987,624.32[11]

(Rejected)

4. To permanently establish itself by the expense of acquiring trade routes, men had been employed to contract with various families and commercial houses throughout the City of Omaha for laundry and dry cleaning services. These men during the previous five years built up for petitioner 15,093 regular trade route customers, all of which were being serviced on November 21,

9. Vol. II, Ex. 19, p. 264.

10. Vol. II, Ex. 23, pp. 272-3. This before and after valuation of power equipment was denied consideration by the jury in the Court's Instructions. cf. Aplt's. br., pp. 15-21. Instructions requested but not given, pp. 21-26. Interest on "brick and mortar" values alone were permitted for the jury's consideration. Argued under Prop. Law I and II. Aplt's. br., 89 and 109.

11. Aplt's. br. XIII, pp. 44-48. Vol. II, pp. 273-9; Court ruling, Vol. II, p. 315. All rejected by Court except land, building and machinery for interest on investment as only measure of damages as shown by all the Court's Instructions. Vol. I, pp. 150-165; Exceptions 165, 167; Petitioner's Instructions requested but not given, 172-178. Assigned and discussed, Aplt's. br., pp. 15-26. Argued, Prop. Law I and II—89, 109.

1942. Under the contract made by the petitioner, the laundry and dry cleaning was picked up without further consent, and when serviced was returned without further contract or agreement between such persons and the company. There were 1500 desk customers who were thus personally serviced. There were 4648 special customers who required special services at times throughout the year. There were 20,802 customers who from time to time sent in table linen, spreads, rugs, comforts, blankets, and lace curtains. These persons aggregated 42,043, called by the trade "trade route customers." There were no duplications in the figure. The petitioner paid to these route men to build and keep these routes during the said five years previous to the taking, $237,654.83, in guaranteed salaries and commissions.[12] This was the principal but not the only item of expense to keep and maintain the routes against the competition from other laundries who likewise had route men at work on guaranteed salaries and commissions. These routes (similar to a newspaper's circulation) had a market value in the trade of $340,516.85. These were worth by trade practices as follows: $20 for each of 15,093 trade route customers; 50c for each of 4648 pillow customers; 50c for each of 6810 table linen customers; 50c for each of 5814 rug and blanket customers; 50c for each of 8178 lace curtain customers; $10 for each of 1500 call customers; and for 44 commercial customers which produced $34,253.13 revenue for 47 weeks during 1942, such as hotels, railroads, clubs, etc., evaluated in the trade at $728.79 per week at 15 times the

12. Vol. II, p. 244; p. 234 shows itemization of gross income past five years. $400,000 for 1942. McDougal, Vol. II, p. 244. Ex. 13 refused. Error VIII, pp. 33-38, Aplt's. br. argued. Prop. Law II, p. 109.

weekly amount, thus providing the said total of $340,516.85 as the value of the trade routes at the time of the taking.[13] These were totally destroyed by the taking and retention of the property by the Army for three years, seven months, and eight days.[14]

5. The Certified Public Accountant's reports proved that no sums were carried for good will, trade name, advertising, or anticipated profits, future business or estimates of the value of the business. Only the real and personalty valued as tangible assets were shown of record. Obviously these audits contained no evaluation of the trade routes[15] as good will.

6. By expert testimony based upon experiences and fully itemized was given in exhibit form the cost to build up again in the City of Omaha these trade routes, giving credit that during the first year the gross income would be $100,000, while the total expense for that period would be $251,680.00, which, after figuring income, would show a net operating loss at the end of the first year of $151,680.00. For the second year the gross income would be $150,000.00 with an expense of $280,366.80, or an operating loss the second year of $130,366.80. For the third year there would be a gross income of $200,000.00 with an expense item of $330,483.20, and an operating loss of

13. The witness Judd qualified as an expert to give these trade route values as a matter of trade practice. The court denied all consideration of them either as separate items or as a part of the value in 1942, or for any purpose whatsoever. Vol. II, p. 367; Ex. 14, pp. 370-1.

14. Vol. II, pp. 437-9. Error predicated on rejection argued p. 89. Add'l. br. 61, XIX; Vol. II, p. 237. Explanation of Ex. 11.

15. Vol. II, p. 200 C. P. A.—Hillmer stating, "These items which were a factor in getting the increased business have been charged to expense and have not been capitalized as good will."

$130,483.20. In the fourth year the company should be able, then, to operate without further losses and build up its net income. But for the three years the net cost to re-establish its laundry and dry cleaning routes with the plant and facilities to be maintained and operated while so doing would be $411,450.00,[16] or a loss of that sum.

7. The building previously valued at $280,348.00 and the land at $30,000.00 were declared surplus after 3.6 years and abandoned to the petitioner. The power equipment and incidental installations were rendered useless or destroyed to such an extent that by orders of the Army commanding officers the plant was declared a danger to human life because of the unsafe condition of the boilers except for limited use at the time of surrender.[17] This power equipment was valued at $62,928.08 at the time of the taking and $35,260.53 at the time of trial, or a loss of $27,667.55 on such items.[18]

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16. Vol. II, pp. 372, 376, 380. All this evidence was rejected, with the trade route values, as not within the issues. Nevertheless in the opinion of the Circuit Court the statement is made wholly without foundation and contrary to the above offered proof at Vol. IV, p. 8. "No doubt the government's occupation of the plant disrupted and damaged the company's business, although it could hardly have destroyed the demand for laundry service in the City of Omaha or disabled the company from ever re-establishing its business." This important part of the opinion erroneously infers that the evidenced cost to rebuild the routes, and the time it would take, and their value, when destroyed by the taking, were absent from the recorded testimony. If the topics were important enough for the Circuit Court to comment upon, it would seem the District Court should have permitted the jury to receive the evidence for consideration in arriving at its verdict. Furthermore, if the Circuit Court wished to pass upon the subjects it should have done so based upon the competent evidence offered in the record as above indexed. Aplt's. br., p. 53, Error XVI and discussion.

17. Vol. II, pp. 310-11, Ex. 22-A, warning by command Major General Craig. Vol. II, pp. 297-8. This offer to prove the laundry could not be operated at all in its condition invoked this trial Court's remark, "I can go down and operate one by myself, and I don't know anything about a laundry." This remark was obviously highly prejudicial and contrary to all the evidence. Error discussed Aplt's br., XII, p. 43, Prop. of Law III.

18. Vol. II, p. 273.

8. The building had structural damage thereto from the overloading of boilers, causing shaking and from rough usage necessary in the rush to get out the vast amount of work. The very finest of expert testimony of petitioner's witnesses gave detailed cost of the repairs to the building to place it in the condition that it was at the time of the taking at $53,970.00,[19] thus reducing the value of the building from $280,348.00 to $226,378.00, exclusive of painting or repairs to plumbing, heating, boilers, power plant, etc. The painting necessary after the 3.6 years was estimated at $17,281.00[20] by the best of expert painting contractors, thus reducing again the valuation of the building by such amount under this plan for determining the damage.

9. Thus it might have been argued to the jury from the evidence, had it been received, that the building was valued, when returned, at $280,348.00 less $53,970.00 and $17,281.00, or $209.097.00; the machinery and equipment at $120,699.75;[20.1] the power equipment and incidental installations, $35,260.53; the land remaining at the same value of $30,000.00; the customers' routes, totally destroyed by the taking. These items aggregate $395,057.28, or a difference in the valuation of the property of $987,624.32 when taken, and $395,057.28, when returned, or a loss to petitioner of $592,567.04, based upon the undisputed evidence on the before and after values. The following tables illustrate the difference:

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19. Peter-Kiewit, Vol. III, p. 831; Ex. 53, p. 835.

20. Vol. III, p. 823, Ex. 52, p. 829 (Steinheimer).

20.1 Vol. II, pp. 245, 262; Ex. 21-3, p. 269. Rejected by Instructions, Vol. I, pp. 157-162. Assigned as error and discussed Aplt's. br., pp. 82, 83, 87; also p. 39; Prop. of Law I and II, pp. 89, 109.

Date of taking Nov. 21, 1942.		Mar. 23, 1946 Date of return.
Land	$30,000.00	$ 30,000.00
Building	280,348.00	209,097.00
Power equipment	62,928.08	35,260.53
Mach., equip.	273,831.39	120,699.75
Route values	340,516.85	none
	987,624.32	395,057.28

Petitioner's Loss on before and after value	$592,567.04
Verdict under the court's instructions	297,776.03
Additional compensation denied	$294,791.01

10. The capital stock was owned by Harry A. Jacobberger, his brother, A. L. Jacobberger, and a son of Harry, Frederick, and their families. Each had spent his life in the laundry business. Frederick became a major in the United States Army in charge of the government laundry at Camp Carson, Colorado, and qualified as an expert with unusual experience. A. L. Jacobberger offered to prove that the laundry had a fair, reasonable, market value as a going concern on November 21, 1942, of $987,624.32. This was denied him.[20.2] For the purpose of verification and explanation of the composite value, exclusive of any value for good will or trade name, he offered to prove and corroborate the evidence of other witnesses as shown in the table supra, page 6.

11. The jury's verdict[21] for the use was $252,000.00, which is exclusive of the $45,776.03 returned under the

20.2. Vol. II, pp. 312-31[illegible]

21. Vol. I, 96; 97.

instructions of the court on the damage to physical property suffered by the petitioner.

12. Assuming that all other losses were included in the difference in the values of the property in 1942 and 1946 as $592,567.04, it is apparent from the evidence that should have been submitted to the jury, under proper instructions, that the verdict might readily have resulted in the sum of $592,567.04 rather than the verdict of $297,776.03 which was based on the evidence as limited by the trial court. (Vol. I, pp. 157-162).

13. The court, by ruling out all the evidence as to the value of the plant as a going concern on November 21, 1942, either for the purpose of showing the basis for determining use or for the purpose of showing before and after value to determine proper pay for use,[22] denied petitioner substantial rights.

14. If the government's witnesses were permitted to testify that the proper measure of damages was the isolated value of the building, the isolated value of the machinery and the land, and to figure a percentage of interest thereon as the government's theory, and accepted by the court, then most certainly the court should have permitted the petitioner's offsetting evidence of what it considered the fair, reasonable "rental" value of the property when offered by the petitioner. This was denied directly or nullified by the court's instructions. The court for all intents and purposes instructed the jury to disregard everything that the owners had stated as to values for temporary use.

22. Vol. II, pp. 315-6; Error Aplt's. br. XIII, pp. 44-6. Argued under Prop. Law I, Aplt's. br., pp. 89, 92, 103-108-9.

and left for the jury only the testimony of the government inexperienced witnesses (Vol. I, pp. 157-162).

15. At the very outset of the trial the court struck the answer of the petitioner (Vol. II, 183). The court refused the applications previously made for a pretrial hearing (error assigned and argued Aplt's. br., V, 26), and failed to enter any order or direction as to the method or manner of proof for the measure of damages, but the court stated, "in a sense we are plowing new ground, trying to arrive at a reasonable basis to afford the * * * owners just compensation under the Constitution." (Vol. II, 262-3.) Consequently, the petitioner, opening the trial, took the position that the fair, reasonable market value of the property at the time of taking would be proper for all purposes in the trial. This the court denied and either refused to hear or ruled out on instructions to the jury evidence of the value when taken for all purposes, as hereinabove clearly set forth and indexed in the footnotes, supra, p. 6.

16. Then the petitioner sought to show the fair, reasonable compensation for the use of the premises during the period because the court repeatedly so ruled. These "use" sums given by Harry A. Jacobberger, A. L. Jacobberger, and Fred Jacobberger were $600,000, $570,000, and $570,000 respectively.[23] Those figures included

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23. A. L. J., Vol. II, 348-367; After 50 pages of examination to substantiate $570,000 as just compensation for the use, including all damages except to trade routes and business, the court said it would withhold ruling. Vol. II, 331—"We will take your motion (to strike the testimony of the owner) under advisement." Further at the close of the testimony, Vol. II, 367—"I will instruct the jury with reference to these items when the time comes." Later the court's instructions nullified the evidence, Vol. I, 155-165. Aplt's br., Exhr XIV, 48 discussed. Instructions, Aplt's. br., pp. 15-26. Argued, Prop. Law II, p. 111, Aplt's. br., Vol. I, pp. 172-8.

all items of compensation except damage to trade routes, business, and good will. Nevertheless, the evidence was excluded under instructions of the court (Vol. I, pp. 157-162).

17. In each instance, as shown in footnote 23, the court either ruled out the testimony or by specific reference to each of the three owner-witnesses renounced their testimony so completely that the jury were left with no practical solution but to find as desired by the government witnesses.

18. There were three principal government witnesses:

(a) C. R. Crowder, who never used, bought, or sold laundry machinery and equipment, nor was he familiar

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Harry J., Vol. II, 421-3; 441-3. The court assumed without cause the witness's estimate of $600,000 for the term included damages for trade route destruction, good will, and loss of business. So under such erroneous impression the testimony was nullified. Vol. II, 421-443. Error assigned. Aplt's. br. XVII, p. 54; argued under Prop. Law II.

Fred J.—unusual qualifications as Army Major in charge of Army laundry at Camp Carson, Colorado, and Jefferson Barracks, Mo., Vol. II, 443-58. His testimony re use compensation, $570,000 for 3.6 years, Vol. II, 454-5, excluded "loss of customers, routes, loss of business, or good will." Vol. II, 458-9. Ruling of court on objection was, Vol. II, 460, "I will intruct the jury on these items when the proper times come." Inst., Vol. I, pp. 157-162 and Inst. denied, Vol. I, pp. 172-8.

Aplt's br., Error XX, p. 63. Instruction of court specifically renouncing the witness Fred J., Vol. I, 157; renouncing A. L. J. testimony, Vol. I, 156; renouncing Harry J. testimony, Vol. I, 156. Errors, Aplt's. br., XVIII, p. 56; XIV, p. 48. Briefed and argued Prop. Law I, 89; II, 110. If the itemization of what the owners had in mind to base their "use" compensation contained items not compensable as the trial court viewed them, the specific items should have been ruled out rather than the denunciation of the court finally saying, after the above comments (Vol. I, 157), "With these considerations in mind, how are we going to find the fair rental value for the use of this property? There does not seem to be anyone qualified to help us reach that figure. * * *" Next the court said in his instructions, Vol. I, 159, "Having once arrived at the value, you then can begin figuring and use as a yardstick an interest rate." Aplt's. br., Errors I-H, p. 18, and I-J, p. 19. Also errors on refusal of instructions: Aplt's. br., Error III, p. 21-5.

The court, by giving the instructions IV-b requested by the government, committed reversible error in a condemnation suit, because the jury

with such property or the plant in 1942 (Vol. III, p. 656); was one of the assistants in the office of the Army Engineers. He went about the city to pick up information here and there about cost of repairs and replacements of such machinery and equipment. He was not a contractor or builder's architect. He was permitted over objections to testify, and compiled his own hearsay exhibits, 594 of them (Ex. 17—objection, Vol. III, 634-5), which were received as "official government documents," and so volunteered by the trial court to the jury (Vol. III, p. 648). Mr. Crowder stated that the cost to restore the entire building, painting, and all else would be $37,521.34 (Ex. 17; III, 692); that it would cost $20,471.27 to restore the machinery where it was in 1942, less ordinary depreciation, including excessive use (Ex. 18; III, 641); and $1,750.40 (Vol. III, 654) for other items of replacement. His estimates total $59,743.01. No other figures were offered by either side that were less than this amount for the restoration of the building and the equipment, power plant, etc. Nevertheless, without evidence from any source, the jury found that this total damage was $45,776.03. ("Rental" $252,000; all damages, $45,776.03; total judgment based on jury's verdict, $297,776.03.) (Vol. I, 95-6.)

(b) Witness Weber (Vol. III, 735-7) who never ran a laundry, who never bought or sold laundry machinery or equipment, and was not a laundryman, stated as a

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were told to disregard evidence that did not appear anywhere as evidence during the trial. Error, Aplt's. br., pp. 25-6; Vol. I, 164. These were: "interference with the business, frustration of the business enterprise, inconvenience to the owner, the unwillingness of the owner to part with his property temporarily * * *." Argued and briefed, Prop. Law III. Aplt's. br., p. 124, stating: "The conduct of the trial must be proper, or reversible error results." Citing 144 Neb. 325, 329-333, 13 N. W. 2d 168. Circuit Court rule limiting pages to 85 stopped further discussion, but the error is obvious and elementary.

professional appraiser[23.1] for the government (III, 736) that the total rental for the 3.6 years should be $70,000 per year, or a total of $252,000. That was exactly the sum the jury found. Under the form of the Exhibit 22 (Vol. III, 735) and the court's instruction (Vol. I, 159) that interest on separate items would produce a proper result, no other conclusion was left for the jury.

(c) Lewis D. Sholes, for the government, a real estate man who never bought or sold any laundry machinery or equipment, never operated a laundry, was permitted to testify that the annual rental, including excessive use, should be $65,663.00 per year, plus additional costs of restoration above normal depreciation of $16,680.00. Mr. Sholes' total of all compensation was, for the period $253,066.80 (Vol. III, pp. 775-8; Ex. 24, 776; 779; 780; 783-4).

19. In the opinion of the circuit court (Vol. IV, 14) the court said, "The jury's verdict was well within the evidence. While the total award was much less than the amount claimed by the company, it is exceeded by about $40,000.00, the highest estimate made by any government expert witness."

20. It will be seen by a careful analysis of the exhibits above referred to and which were received in evidence over objection, that the jury's verdict was less than the estimate for restoration made by Mr. Crowder ($59,543.01) by approximately $15,000.00. The verdict for the

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23.1 Vol. III, pp. 723; 725; 728-9; 735-7; 744; 747; 749; Ex. 23, 750; Ex. 22, 735.

"rental" was that fixed by the witness Weber ($252,000.00) and almost identical with the total sum for all purposes fixed by the witness Sholes for the government.

21. Under the instructions of the court for all practical purposes the jury was denied the right to consider any evidence of the petitioner's witnesses generally.[23.3]

22. Error has thus been committed, and substantial justice has been denied as hereinabove shown by proper reference to the record (Aplt's. br., 14-88).

23. All the foregoing were set up as points relied upon for reversal and each was specifically argued and discussed therein (Aplt's. br., 89-128). By stipulation of counsel the points relied upon for reversal were set up in the brief instead of in the record (Vol. I, 142). Each was discussed and argued under the propositions of law (Aplt's. br. 89-128).

24. The references made in the footnotes should suffice as proof of the assertions that the circuit court had before it sufficiently the points, their discussion and the legal arguments upon them. However, under Proposition of Law No. III pertaining to the conduct of a trial under Nebraska state law in reference to pleadings and trial procedure for lack of space (brief limited by Circuit Court rule to 85 pages was extended to 125); "Rebuttal testimony, if substantial and material, shall be received (56 Neb. 600, 605, 77 N. W. 120), although properly in the main case." The point was discussed under points XXX, XXXI, XXXII, Aplt's. br., pp. 82-8 (Ex. 52, III,

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23.3 Vol. I, pp. 157-162.

829; Ex. 58, III, 835; Ex. 55, III, 847). All the evidence in rebuttal (save Dahlquist's on repairs to machinery) was rejected by abuse of discretion. It was offered to meet the testimony of Mr. Crowder for the government. It was proper rebuttal under the plan of procedure adopted by all courts. The unfair result to petitioner may be concluded from the following table taken from record heretofore given (Supra, 5; 9-10):

Govt. witness Crowder's estimates for restoration of damages to structures.		Petitioner's witnesses rejected except Dahlquist.		
Bldg. & Painting	$37,521.34	Bldg. (Kiewit)	$53,970.00	Rejected
		Painting (Steinheimer)	17,281.00	Rejected
Machinery	20,471.27	Boilers (Hanighen)	21,678.00	Rejected
		Boilers	6,183.00	Rejected
Replacements	1,750.40	Mach. & Equip. repairs (Dahlquist)	34,309.42	Received
(Received)	$59,743.01		$133,421.42	

25. The Jury's verdict for restoration damages was $45,776.03. The petitioner, of course, could not argue to the jury any item to contradict Crowder except Dahlquist's $34,309.42 by virtue of the rejecting of these exhibits and testimony by the court as above shown.

26. The Federal Rules of Civil Procedure [81 (a) (7)] exclude procedure in condemnation trials, and 40 U. S. C. § 257-8 (g) (appendix to Aplt's. br. pp. 4-6) specifically provides that in questions of procedure the state practice shall be followed. No substantial right would have been denied the government by the admission of

the testimony of the witnesses Kiewit, Steinheimer, and Hanighen in rebuttal to Mr. Crowder's. These were reputable men in their respective lines of business. They wholly discredited witness Crowder's statements.

Written pleadings are required under the Nebraska practice. The court struck all of petitioner's answer (Vol. II, 183). (Vol. III, pp. 823; 828-9; 831-8; 847.)

27. The trial court reversed itself by first stating rebuttal would be allowed petitioner because as the trial proceeded, petitioner offered evidence of before and after values, offered evidence of total values at time of taking for purposes of use value; then to meet the court's theory offered evidence of use value all as above related. This evidence was all either denied at the time of offer or substantially ruled out by the court's instructions. Consequently, when the restoration costs of $133,421,42 were offered in rebuttal to meet the Crowder testimony of $59,743.01, and rejected, a grave error of indiscretion occurred. It was not merely procedural irregularity (56 Neb. 600, 77 N. W. 120). Under 28 U. S. C. § 391; Jud. Code § 269, as interpreted, the ruling out of any competent testimony affecting substantial rights of one party gives grounds for examining the entire record and granting certiorari to see that justice is done if the facts warrant. (Vol. III, pp. 812; 815; 826-831; 831; 833-835; 847; 857-9; 863.)

This table may be used to illustrate the basis to figure the loss in interest hereinafter shown.

Date of Order of Taking	To What Date	Dates of Deposit	Amount	Date Withdrawn
Nov. 21, 1942 (I,2)	June 30, 1943	June 21, '43	$30,140	Feb. 1, 1944 (I, 53)
May 11, 1943	June 30, 1944	Apr. 6, '44	50,000	Apr. 13, 1944 (I, 59)
Aug. 12, 1944	June 30, 1945	Aug. 10, '44	50,000 (I, 68)	Aug. 18, 1944 (I, 72)
May 28, 1945	June 30, 1946	Aug. 8, '45	65,000	Aug. 11, 1945 (I, 89)
Judgment, $297,776.03 April 9, 1946		June 11, '46	98,124.27	Aug. 16, 1946 $75,000.00 (I, 39)
Pd. by purchase of govt. mach.		Mar. 23, '46	18,089.55	

28. The petitioner herein claimed interest at 6% on the $297,776.03 judgment as additional damage for the taking, beginning with the date of the taking to the time elected by the government to terminate the taking, June 30, 1946. The property was declared surplus and abandoned to the petitioner on March 23, 1946 (I, 97). Admittedly from the date the funds shown on the foregoing table were paid into the Registry of Court, the 6% would abate. There remains in the Registry of Court approximately $25,000, pending appeal (I, 139).

29. The court granted no interest whatever on $45,776.03 of the judgment. It should have granted interest at 6% thereon from the date of taking on November 21, 1942. Instead of granting interest on $252,000 at 6% from November 21, 1942 (less the payments made by deposit in the Registry of Court with interest thereon), the court after trial treated each year as a new taking without reference to the original time of taking, and by so doing the petitioner in the judgment rendered was de-

nied $21,314.72, at time of judgment, for interest compensation under the Statute (40 U. S. C. § 258a). This denial of interest was assigned as error, discussed, and argued under point XXII, page 66, appellant's brief, and Proposition of Law IV with the discussion thereof on pages 125-6 of appellant's brief referring to petitioner's motion in arrest of judgment (I, 97) and motion for new trial (I, 107). The trial court failed to correct this point relied upon and argued as above shown. Also the court refused to grant interest on $34,875.50 in supplies that were condemned and taken by the government on November 21, 1942, and not paid for until July 8, 1943. This interest up to the time of the judgment on April 9, 1946, amounted to $1,307.11. Both these items of interest were properly before the trial court[24] and the United States Circuit Court of Appeals. The federal statute cited clearly covers the situation of granting interest as contended by petitioner. Both items now aggregate in excess of $25,000. The cases to sustain Prop. of Law IV, Aplt's. br., pp. 125-6, seem to announce the only applicable law. The statute refers to interest for all purposes and makes no such permissive exception as erroneously made. (Aplt's. br., app. p. 6. 40-2 U. S. C. Sec. 258a. Infra, p. 40.)

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24. Assigned as Error Aplt's. br. p. 66, argued, on p. 126. Contained in Answer stricken, Vol. I, p. 30. Pet. in error, p. 51(2). Discussed by Court, Vol. II, p. 183; Motion in arrest of judgment denied, Vol. I, p. 98, III. Motion for new trial denied, Vol. I, p. 108(4). There was no disagreement regarding this item and when paid. The facts are not in dispute. The government claims because it voluntarily paid the item and the check was accepted, that concluded the matter. However, the supplies were taken along with all else. Payments may be received without prejudice to further rights under Sec. 258a U. S. C. 40-2.

QUESTIONS PRESENTED

I.

Did the trial court commit reversible or harmless error under 28 U. S. C. § 391, Jud. Code § 269, (1) by refusing to admit evidence, (2) by refusing to receive certain evidence offered, (3) by receiving certain evidence over objection, (4) by giving the court's instructions considered all together, (5) by refusing to give certain instructions requested by petitioner, and (6) by overruling the motion in arrest of judgment and overruling the motion for new trial?

II.

Is not the opinion of the United States Circuit Court of Appeals in error by stating that the judgment reflected all the elements of value which lawfully might be considered in determining the issue of just compensation to which the petitioner was entitled and that no errors of law were committed by the trial court that would warrant a reversal? The record shows thirty-two points relied upon for reversal, each of which was discussed with record page references given. (Aplt's. br., pp. 14-88; discussed and argued Prop. L. I, II, III, and IV, Aplt's. br., pp. 89-124.) These references sufficiently refute the opinion of the circuit court that most of the points relied upon for reversal "are not argued in the brief and virtually all of them reflect the divergence of views of counsel for the Company and those of the trial court relative to the proper standards for ascertaining just compensation." (Vol. IV, pp. 6-7.)

III.

In attempting to arrive at just compensation, was it not error for the trial court to deny the petitioner the right to prove the fair, reasonable market value of its plant as it was at the date of taking, when the evidence shows that the condemnor took and destroyed, as a direct result of the taking, with knowledge of the resulting damage, all the existing routes constituting the most valuable of the component parts of the composite property? (Aplt's. br., Error XIII, pp. 44-7; supra pp. 6-7, 11 with footnotes.).

IV.

Did not the trial court err in ruling out the evidence of the petitioner that it was completely and entirely driven from business by virtue of the taking and could not re-establish itself because of the obvious result of the taking, and the delayed "piecemeal" pay plan adopted by the government? (Table, supra p. 19; Error XIX, Aplt's. br., p. 61; Prop. L. II, p. 109; Vol. II, 437-9; supra p. 4.)

V.

Did not the trial court err in rejecting audits of the company, competently prepared, from which might be argued the facts that any dealer for the property for any purpose would desire to know? (Vol. H, Ex. 1-7, pp. 188-221; Error VII, Aplt's. br., pp. 28-33; argued Prop. L. I, pp. 95-8; supra, p. 5.)

VI.

Did not the trial court err in rejecting the evidence of the competent witness Judd, who offered to prove for

the consideration of the jury in assessing petitioner's damages the actual value of the trade routes in the course of business and as an inherent part of the business of a servicing company, and who offered to prove what it would cost the company based upon the experience of that company in the City of Omaha to re-establish those routes over the succeeding three years after the plant was abandoned to the petitioner. (Supra pp. 6-9; Vol. II, 367; Ex. 14, pp. 370-1, 372, 376, 380. Error XV, Aplt's. br., p. 51, and XVI, p. 53. Discussed, Aplt's. br., Prop. L. I, p. 89.)

VII.

Did not the court err, after the petitioner's case was closed, by permitting a government witness (Crowder), who failed to qualify properly as a competent authority on costs, to give his estimates of the probable cost to restore the property, including the building and machinery, which estimates consisted of 594 hearsay items; and over objection, the court remarking in the presence of the jury that such 594 documents were "government documents" and "official reports" and with such prestige were admitted? (Aplt's. br., Error XXVI, p. 70; argued Prop. L. II, p. 109; cross-exam., Vol. III, pp. 641; 648; 656-669. Supra, pp. 14; 16; 17; 19.)

VIII.

Did not the court err in receiving the evidence, over objection, of the government witnesses (Weber and Sholes), neither of whom was qualified to state that the fair, reasonable compensation for "temporary use" was a sum of money based upon interest on the value of the

building separately, the machinery and equipment separately, and the land separately, as appraised by the witnesses themselves, when the witnesses themselves could give no precedent in the laundry business for such a method for just compensation and when the court had before it a more fair and just method of arriving at just compensation by the difference in the values of the property before and after taking, or by fixing compensation based upon the fair, reasonable value of the property at the time of taking? (Weber, Vol. III, 721-757; Error XXVII, Aplt's br., pp. 72-5; argued Prop. L. II, p. 111. Sholes, Vol. III, 760-801; Error XXVIII, Aplt's. br., pp. 75-8; argued Prop. L. II, p. 111. Supra, pp. 6, 11, 18.)

IX.

Did not the trial court err in nullifying the evidence of the three officers and owners of the company when they offered their estimates of the fair, reasonable rental value of the physical assets, exclusive of good will, trade routes, and trade name, when such witnesses were the only qualified witnesses to give such testimony? And further, did not the trial court err in withholding its ruling on the government's objection to such testimony and then renounce it by instructions thus leaving no other testimony before the jury on such subject, as stated in the instructions of the court except the "expert witnesses" who gave as a proper measure of damage, interest on land, building, and machinery? (H. A. J., Vol. II, 421-443; Error XVIII, Aplt's. br., pp. 56-61. F. J., Vol. II, 454, 460; Error XX, Aplt's. br., pp. 63-4. A. L. J., Vol. II, 367; Error XIV, Aplt's. br., 48-51. The court's

instructions, Vol. I, 152-161. Error I, Aplt's. br., pp. 15-19. Argued, Prop. L. I, II, pp. 88, 109. Supra, pp. 13-14.)

X.

Were not the composite instructions of the trial court so at variance with both the facts and the applicable law as to substantially prejudice the rights of the petitioner by denying it just compensation, even under the measure of damage plan adopted by the court for the conduct of the case? (Court's inst., Vol. I, pp. 157-165; Error I, Aplt's. br., pp. 15-19; Prop. L. III, p. 124. Inst. requested by petitioner, refused, Vol. I, pp. 172-8. Supra pp. 12-14.)

XI.

Did not the court commit reversible error in refusing the rebuttal testimony of the petitioner's witnesses to rebut the government's witnesses on the cost to repair and replace the broken parts of the building, machinery, equipment, boilers, and power plant, especially under the indefinite plan for measuring damages finally adopted by the trial judge? (Aplt's. br., pp. 82, 83, 87; argued Prop. L. III, p. 124. Petitioner submitted as a Prop. L. that: "Rebuttal testimony, if substantial and material, shall be received (56 Neb. 600, 605, 77 N. W. 120) although properly in the main case"; supra, pp. 18-19).

XII.

In an action in condemnation for just compensation, is it error for the court to instruct the jury that the case before them is not one for "damages" but is an "in-

quest"? (Error I-g, Aplt's. br., p. 16. Discussed Prop. L. I., p. 88; Vol. I, p. 155.)

XIII.

Did not the court commit reversible error when it instructed the jury to disregard evidence which was entirely absent from any testimony or evidence offered or received at the trial? The court instructed the jury to allow just compensation "without any sentimental values, without any good will, or the fact that it was a going concern, or the fact that they were put to a lot of consequential damages. That is what they refer to. Consequential damages are just their hard luck that they happened to be selected, the same as it would be the hard luck of your son if he were called into the army." (Vol. I, 159; Error I-i, Aplt's br., p. 18; Prop. L. II, p. 109.)

XIV.

Did not the court err in failing to interpret 40 U. S. C. § 258a as amended (Aplt's. br., appendix, p. 6) as granting petitioner as a matter of statutory law 6% interest on the entire judgment of the jury from the date of the taking? Did not the court err by deciding without judicial precedent 6% interest only from the beginning of each fiscal year as if in fact there had been a separate taking of the same property at the beginning of each fiscal year? (Error XXII, Aplt's. br., p. 66; argued Aplt's. br., Prop. L. IV, p. 125. To the same effect, did not the court err in failing to grant interest on $34,875.50 of supplies condemned and taken on November 22, 1942, but not paid for until July 8, 1943? Points raised in answer, Vol. I, p. 30; stricken Vol. II, p. 183; raised in pet. in error, Vol. I, p. 52; raised again in motion in

arrest of judgment, Vol. I, p. 98, overruled; and in motion for new trial, Vol. I, p. 108, overruled; judgment entered denying interest as claimed, Vol. I, 103-7. Error XXII, Aplt's. br., p. 66; Prop. L. IV, p. 125; 40 U. S. C. § 258a. Supra, pp. 19-21.)

XV.

Did not the trial court commit reversible error when repeatedly throughout the trial and in its instructions to the jury it stated that the law announced by the Supreme Court of the United States in *U. S. v. General Motors Co.*, 323 U. S. 373, decided January 8, 1945, and in *U. S. v. Petty Motor Co.*, 327 U. S. 372, decided February 25, 1946, required the court to instruct that no damages could be considered (Vol. I, p. 155); just compensation must be limited to "rent" to the exclusion of other competent measures of damages of record (supra, pp. 6-8; 11; 18), figured as interest on the land, the building, and the machinery, separately valued (Vol. I, p. 159) with an additional sum, exclusive of general depreciation, for the estimated cost to repair or replace broken parts? (Trial court refused to set case for trial until General Motors case decided, Vol. I, pp. 74 and 60; motion for new trial, Vol. I, p. 124, pars. 25-6; Court's inst., Vol. I, 152; Vol. II, pp. 230-32. Court made ruling to limit petitioner's case to "rules laid down in the Utah case and in the Chicago case, the General Motors case." Vol. II, p. 232.)

XVI.

Did not the United States Circuit Court of Appeals commit error when it held that the decisions in U. S.

v. General Motors Co. and U. S. v. Petty Motor Co. were its authority for stating, "We cannot accept this proposition of law"? The said proposition of law is Prop. L. I set forth in appellant's brief, p. 89 and is copied from the opinion below, Vol. IV, p. 8, as follows:

> "When all the physical assets of a going business, such as a laundry and dry cleaning corporation, are condemned for the purpose of governmental operation of the same business for the exclusive use of the army, thus putting the condemnee corporation out of business entirely, the fair, reasonable market value to the corporation as a going concern on the date of the taking forms the proper legal basis upon which to measure such just compensation. The established laundry trade routes, when so proven to have a readily ascertainable value on the market, form a part of the composite fair market value on the date of taking. These routes are distinguished from the non-compensable items of good will, loss of profit, and loss of further business. If it is proven that these routes would be destroyed as a natural consequence known to the condemnor as a direct and proximate result of the taking of the physical plant owned by the condemnee, their value forms a part of the total value of the compensable property taken. The refusal of the trial court to receive competent evidence offered to prove such value is reversible error."

(Evidence on factual matters embraced in above statement of the law was rejected by the trial court. Cf. points relied upon for reversal, Appellant's brief: Error VI discussed, p. 27; VII, 28; VIII, pp. 37-8; XIII, pp. 44-8; XV, pp. 51-2; XVI, pp. 53-4; XVII, pp. 54-5; XIX, p. 61; XII, p. 43. Errors argued in the Propositions of Law, Aplt's. br., Prop. Law, pp. 89-109.) (Court's Inst., Vol. I, p. 154, stated: "Under the Constitution and under

the law you cannot make any allowance whatever for property that is not taken." Supra, pp. 6-11.)

XVII.

Did not the court err by failing to properly interpret and apply the condemnation statutes (supra, p. 3; appendix Aplt's. br., pp. 1-16) relied upon by the government in its petition (Vol. I, par. 1) filed November 21, 1942, and the same statutes pleaded in defense by the condemnee in answer (stricken, Vol. II, p. 183) and in its requested instructions (refused, Vol. I, p. 172), principally in the following particulars:

1. These statutes should properly be interpreted in pari materia.

2. When so interpreted, Section 171, 50 U. S. C., as amended, does not clearly cover the case at bar, because the condemnee possessed land but did not possess "the temporary use thereof or other interest therein." Instead, the government created a "temporary use" of its own by its petition and by so doing took over an operating company "pro tem."

3. The result of the taking rather than the form of the petition determines the extent of condemnation for the purpose of paying just compensation, and this power of determination is lodged exclusively in the judicial branch of the government.

4. Congress has protected previous owners and the government as well by enacting Section 722, as an amendment to the Act of October 16, 1941, 50 U. S. C., entitled, "Return of Property to Original Owner." So that value

before and value after has been recognized in this effective manner. Prop. L. II, Aplt's. br., pp. 112-123, brought this point to the Circuit Court's attention.

5. This difference in the value at time of taking and at time of return, while recognized by Congress and as proper by the courts, was erroneously denied the laundry company in this case (cf. petitioner's instr. refused, Vol. I, Inst. No. II, p. 172; No. X, p. 175; No. XIII, p. 177; No. XIV, p. 177. Answer, Vol. I, pleading the statutes, Vol. I, p. 21, at pars. XV, XVI, XVIII, pp. 28-9. Order striking same, Vol. II, p. 183; Vol. II, p. 863. Motion for new trial, Vol. I, p. 107, overruled. Special exhibits were attached to the motion as these statutes, Vol. I, pp. 126-134. Error in striking them from consideration set forth and discussed, Aplt's. br., p. 26; Prop. L. argued I and II, Aplt's. br., pp. 89, 109. All condemnation statutes in question are copied in full in appendix to Aplt's. br.)

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

I.

Herein the Circuit Court has decided an important question of federal law which has not been but should be settled by this Court.

1. The issue presents an important phase of the law of eminent domain not passed upon under the present amendments to the condemnation statutes; and the opinion is at variance with previous decisions of this Court under the previous statutes. Under these new stat-

utes (supra p. 3 and Appendix Aplt's. br.) in force when the case at bar was filed protection of condemnees against lessening of just compensation was made more certain.

2. There were three phases of the law in which the public had an interest because every citizen's property, including operating businesses, might be taken for military purposes. The statutes prohibiting taking by condemnation, "of any machinery or equipment which is in actual use in connection with an operating factory or business and which is necessary to the operation of such factory or business," was enacted October 16, 1941, by the First War Powers Act (50 U. S. C. § 721, C. 445, 55 Stat. 742) and was repealed by the Second War Powers Act, 1942 (50 U. S. C. § 636, amending said previous law, § 721). This later statute left in force Section 2 of the Act of October 16, 1941, providing for the return to the owner of the property condemned if the owner would pay the government for its then value, and by Section 722 of 50 U. S. C., the time for offering to return to the owners if paid for at its then value was extended to December 31, 1946. The property in question herein was taken November 21, 1942, and abandoned to the owner as surplus property on March 23, 1946 (Vol. I, 97), in its then condition. These statutes should be interpreted in pari materia and announced as the law applicable to the facts in the case at bar.

3. On January 8, 1945, this Court granted certiorari and decided one of the three phases of eminent domain in *U. S. v. General Motors Co.*, 323 U. S. 373, and granted certiorari because a question of first impression was in-

volved in the interpretation of the measure of damages for taking a part of the term of condemnee's lease or temporary use. The property was a warehouse. The taking left the condemnee-tenant the privilege of returning and using the warehouse for the unexpired term of the lease. Damages were awarded for the destruction and loss resulting from the moving out and ostensibly back again.

4. On February 25, 1946, this Court granted certiorari and decided the second phase of the questions involved in condemnation in *U. S. v. Petty Motor Co.*, 327 U. S. 372, wherein the entire lease or temporary use of the condemnee-tenant was taken, and the resulting damages were held nonexistent and denied.

5. Now herein arises the third phase of the law of eminent domain and for which certiorari should be granted. Herein the condemnee was neither a lessor nor a lessee, nor the occupier by temporary use of the property involved, but was the absolute fee owner and operator of a going laundry and dry cleaning business consisting of real and personal property (Supra, pp. 3-6).

6. The government ~~for the first time~~ mentioned in any reported case, took, according to its petition of taking, only a "temporary use" of building and machinery, but for all practical common-sense purposes actually took a going business institution which it needed for its Army and substituted its own pay customers for the route customers of condemnee. Certiorari should therefore be granted likewise herein in order to present the third phase to determine the proper measure of damages upon

the abandonment of the property to the petitioner after 3.6 years of government operation (Supra, pp. 6-9, Vol. II, p. 448).

7. The only element of any appreciable value to make the bricks, mortar, and machinery of value in this particular business, was its trade routes, which were destroyed. They were the most valuable of any part of the property. Condemnee was a servicing company. It could not carry on business elsewhere. It could not move, as it was left nothing to move. It could not serve. Its routes were destroyed. Such destruction was not consequential damages, or loss of future business, or frustration of a plan for development, nor was it a loss for good will. In the case at bar, those elements were specifically eliminated from all evidence of value offered as proof as the record shows (Supra, pp. 13-14; 8[15]).

8. If certiorari is granted, petitioner will so demonstrate to this Court.

II.

The decision of the Circuit Court of Appeals in this case decides a federal question in a way probably in conflict with the applicable decisions of this Court on the question of the condemnation of property of a going concern.

1. The Circuit Court opinion below recites:

> "Where the right to temporarily use and occupy property is the interest taken, just compensation is the value on the market of the use and occupancy (*United States v. Petty Motor Co.*, supra), but evidence of loss of profits, damage to good will, and other such consequential losses must be excluded in determining market value. Id., pages 377-378."

2. The *General Motors Co.* case is cited in the opinion as authority. The opinion below rules out the trade's accepted value of the routes as an existing asset, by classifying them within the foregoing statement (Vol. IV, p. 8).

3. The opinion also attempts to justify ruling out the evidence of experts on the value of the routes separated from the plant as well as an element of the composite value of the laundry and dry cleaning establishment as a going concern. The Circuit Court also approves the denial of the trial court of evidence of the cost to reestablish these routes. Furthermore, the opinion upholds the trial court's denial of the right to prove the difference in the value of the property at the date taken and the date declared surplus and abandoned to the petitioner. Such holdings are in conflict with other applicable decisions of this Court.

4. For example, *Monongahela Nav. Co. v. U. S.* (1893), 148 U. S. 312, 13 S. Ct. 622, was reversed because the evidence of the value "did not take into account the franchise of the company to collect tolls." The court said:

> "The result of the trial was a finding by the court that the value of the lock and dam No. 7 was $209,000, 'not considering or estimating in this decree the franchise of this company to collect tolls.'"

The case was reversed because, as stated:

> "So before this property can be taken away from its owners, the whole value must be paid; and that value depends largely upon the productiveness of the property,—the franchise to take tolls."

5. Furthermore, the court stated that it was not bound by the statements in the declaration of taking (petition in condemnation) as to what was taken:

> "We are not, therefore, concluded by the declaration in the act that the franchise to collect tolls is not to be considered in estimating the sum to be paid for the property.
>
> "That just compensation requires payment for the franchise to take tolls as well as for the value of the tangible property."

6. Furthermore,

> " * * * And with respect to constitutional provisions of this nature, it was well said by Mr. Justice Bradley, speaking for the court, in Boyd v. U. S., 116 U. S. 616, 635, 6 Sup. Ct. Rep. 524: 'Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be obsta principiis.' "

7. In *U. S. v. Powelson* (1943), 319 U. S. 266, 63 S. Ct. 1047, certiorari was granted and the cause reversed because the damages to the power sites therein involved were evaluated in the condemnation proceedings though undeveloped. They had value, no doubt, but, the opinion stated, "a promotional scheme wholly in futuro is not private property." The majority opinion states:

"* * * If these numerous tracts had already been united by respondent through the power of eminent domain into a power project, distinct problems would be posed as Sears v. City of Akron, supra, indicates. Then the United States would be acquiring a business, not simply frustrating a promotional scheme. * * *

"We hold only that profits attributable to the enterprise which respondent hoped to launch, are inadmissible as evidence of the value of the lands which were taken."

8. The *Powelson* case cited in the opinion in the case at bar to sustain the trial court, as a matter of law sustains the contention of the petitioner. If the *Powelson* case is authority for the justification of the opinion below, then there is most certainly a conflict in the decisions of this Court on the subject of what shall be taken into consideration when a going business is destroyed by the taking.

9. The cases which hold that loss of business and good will are not compensable are usually found in that class of cases where the land or building was taken by the government, and the condemnee had the opportunity with both the money paid and the facilities not taken, to carry on the business elsewhere, such as in *Bothwell v. U. S.*, 254 U. S. 231 (cattle ranch condemned; cited to sustain opinion below, Vol. IV, 8).

10. Also, the decision in *Joslin Mfg. Co. v. City of Providence*, 262 U. S. 668, involves a rule founded upon a statute that, "Injury to a business carried on upon lands taken for public use, it is generally held, does not

constitute an element of just compensation," but the case likewise states, "This statute therefore does not deny a right; it grants one and limits it to a business already established." The court stated, "One who came after the enactment and established a business did so with notice that the extra constitutional compensation provided for would not apply to him." The classification was held constitutional (cited to sustain opinion below, Vol. IV, p. 8, but obviously does not).

11. *Mitchell v. U. S.*, 267 U. S. 341, arose over a special statute providing for the condemnation of land for military purposes in Maryland near Washington. The award was made for the damage to lands upon which a special grade of corn was raised, then later in the Court of Claims the condemnee was denied the right to damages to the corn canning manufacturing business. The claim was based upon the fact that because the sweet corn fields were taken, therefore the manufacturing plant should be compensated for the loss because no more corn could be obtained from the condemned fields. However, the court stated, "Moreover, the act did not confer authority to take a business. In the absence of authority, even an intentional taking cannot support an action for compensation under the Tucker Act."

12. These last three cases cited in the opinion below (Vol. IV, p. 8) in the case at bar fail to substantiate the decision. Nor do these cases support the opinion on the factual situation that the damages done to the trade routes fall into the category of consequential or other noncompensable damages.

III.

The decision of the Circuit Court below is in conflict with decisions of other Circuit Courts on the same matter.

1. In *National Brick Co. v. U. S.* (C. C. A., Dist. Columbia, 1942), heard before Groner, C. J., Miller, and Vinson, 131 F. 2d 30, both the conduct of the trial and the conclusions were reviewed. There the brick company owned and was using and selling from time to time valuable deposits of sand lying under the surface of the lands which the government needed. The Circuit Court held that evaluating the land with the sand in place should not be interpreted that the condemnee was seeking to prove the profits to be derived from the sale of sand. In the case at bar the court bases its opinion on the fact that the trade routes were evaluated as future profits or good will and therefore held the destruction to be noncompensable.

2. Thus, it would seem that these two opinions are directly in conflict.

3. The opinion is also in conflict with a number of United States District Court decisions that have never been appealed because settlements were made in those cases. For example, in *U. S. v. Land in Oakland* (Cal.), 53 F. Supp. 767 and in *U. S. v. Bauman* (Ore.), 56 F. Supp. 109, the courts held that a temporary use with the term extended from year to year amounted to a taking of the fee for all intents and purposes. In such case the before and after value was held to be a just way to estimate the compensation for the so-called temporary use of such property. The trial court herein refused to

follow those cases, and the Circuit Court approved the trial court's rulings.

4. Also, the decision of the Circuit Court herein is in conflict with *1100 Acres in Smith County, Texas* (C. C. A. 5, 1945), 152 F. 2d 566. There the development of oil lands was stopped by the use of the surface by the Army. The resulting damages in reference to the inability to carry on operations in the oil beneath the lands, was the subject matter of proper compensable damages when proven. The reasons given in the Texas case are diametrically opposed to the reasons given by the Circuit Court in the case at bar in upholding the trial court in denying similar compensable damages.

IV.

The opinion of the Circuit Court has so far departed from the accepted and usual course of judicial proceedings or so far sanctioned such departure by the lower court as to call for an exercise of this Court's power of supervision.

1. There are under this heading two main reasons for the allowance of the writ of certiorari. The first is in reference to the error in figuring interest. The result is diametrically opposite to the clear unambiguous wording of the interest statute, Sec. 258a, 40 U. S. C. Under that section a large number of cases have been decided which were submitted and argued to the Circuit Court (Aplt's. br., Error XXII, p. 66. Prop. L. IV, p. 125; Supra, pp. 19-21). Interest is a matter of additional just compensation (about $25,000) payable to petitioner because deprived of its property completely and entirely on and after November 22, 1942. It would seem that the fiction of repeated ex parte continuances of the possession under

the power of eminent domain should not be permitted by the Court to defeat the application of the statute. The decision of the Circuit Court below is supported by no cases which have ever been reported anywhere to justify the opinion in that regard. Accordingly, the opinion is in direct conflict with *U. S. v. Rogers* (1921), 255 U. S. 163, 41 S. Ct. 281; *Seaboard Air Line Ry. Co. v. U. S.* (1923), 261 U. S. 299, 43 S. Ct. 354; *Phelps v. U. S.* (1927), 274 U. S. 341, 47 S. Ct. 611; *Liggett & Myers Tobacco Co. v. U. S.* (1927), 274 U. S. 215, 47 S. Ct. 581; *U. S. v. Northern Pac. Ry. Co.* (Wash. 1943), 51 F. Supp. 749; *U. S. v. Land in Saunders County* (Neb., 1944), 57 F. Supp. 745; *U. S. v. Land in New York* (1945), 147 F. 2d 351; *U. S. v. Land in St. Louis* (1941), 41 F. Supp. 809.

2. The second reason under this heading for the allowance of the writ of certiorari is based upon the Circuit Court's sanction of the trial court's conduct of the case. It may be seen by reading all the instructions of the court (Vol. I, p. 150; and the volunteered remarks of the court referred to supra pp. 3-21) that the court began the trial and concluded it by announcing certain rules in eminent domain proceedings, which destroyed all the testimony and evidence before the jury from a common sense viewpoint that was introduced by the witnesses for the petitioner. In effect the trial court instructed the jury to find "rent" based upon a formula concocted as interest on the value of the separate items found by the government's witnesses, and nothing else of substance was left for the consideration of the jurymen, but to find as they did (Supra, pp. 18; 11; 6-9; Vol. I, pp. 152-165).

3. Similar conduct of a trial court aided in causing the reversal of the case of *National Brick Co. v. U. S.*

(C. C. A., Dist. Columbia, 1942), 131 F. 2d 30; and in the Nebraska case of *Langdon v. Loup River* (1944), 144 Neb. 325, 13 N. W. 2d 168, wherein the court said:

> "Each party is entitled to have the jury pass upon the evidence without having its effect or importance altered, either as to credibility or value, by the indulgence of the court in remarks to witnesses or comments upon them or their testimony, which may tend either to magnify or diminish it in the jury's estimation."

4. In the National Brick Co. case the court said:

> "* * * We think sufficient harm has been done by the rejection of proper evidence of value, coupled with the judge's statement limiting the appraisal to the value as real estate, to leave the jury bewildered as to the proper elements to be taken into consideration in ascertaining the fair market value of the property." (Supra, pp. 9;[17] 13;[23] 14;[23] Vol. I, pp. 155-162; Vol. II, pp. 348-9; Vol. III, pp. 632; 648. Motion New Trial, Vol. I, part II, pp. 115-134.)

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for writ of certiorari should be granted.

Dated May 24, 1948.

Respectfully submitted,

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